place but she was still counting. The appellant could see the cashier busy at work through the transparent screen and she had not indicated that she was ready to attend to him. However, the trough on the customer's side was partially open so the appellant put in the form and money in the trough. Both he and his wife were still waiting for the cashier to attend to them. It was at that stage that someone drew their attention to a $10/- note lying on the floor. After the appellant had bent down to pick it up, both he and his wife discovered that the money which had been placed earlier in the trough was missing and the stranger had disappeared.

Our considered opinion is that both the respondent bank and the appellant were equally negligent. The bank's negligence was the failure of the cashier to close the lid on the customer's side of the trough fully whilst still attending to the needs of an earlier customer. She had carelessly left it partially open, thereby indicating according to the procedure an invitation to the appellant to put in the money. The appellant's negligence was that he put the money in the trough which was partially open when he could see through the screen that the cashier was still not ready to attend to his need and thereafter failed to ensure the safety of the money. As stated earlier, possession of the money, in our view, had not passed to the bank because the cashier had not pushed the lid forward to close the customer's side. It is most unfortunate that the appellant had lost the money in the trough by an unexpected event of theft after his attention was distracted from the large amount of money in the trough to a mere $10/- note on the floor. In our judgment, the loss should equally be apportioned between the respondent bank and the appellant, and the appeal should be allowed on that basis. The appellant is entitled to costs both here and in the Court below and the deposit be refunded to him.

Order accordingly.

Solicitors: *Farid Ariffin & Associates; Shearn Delamore & Co.*

TENGKU HAJI JAAFAR IBNI ALMARHUM TENGKU MUDA ALI & ANOR. v. GOVERNMENT OF PAHANG

[S.C. (Salleh Abas L.P., Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) December 4, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 376 of 1985]

Islamic Law – Gift – Concession by former Sultan of Pahang – Constituent elements to constitute valid gift – Gift never perfected or consummated by the taking of possession – Description of land – Concession not recognised by State Government nor registered – Failure of donees to take possession – State land – Limitation – Pahang Land Regulations, 1889 – Land Enactment, 1903 – Registration of Titles Enactment, 1911.

Pahang – Historical perspective – Land Administration in Pahang – Application of Islamic Law.

On January 19, 1888, corresponding to 6th Jamadil Awal 1305, the Sultan of Pahang by a document bearing the same date made a gift *inter vivos* of a large tract of land described as "all that river district being the basin of Sungei Tembeling and all the tributaries from their sources to their mouths and situate in the State of Pahang" to his daughters Tengku Long and Tengku Dalam. The first appellant is the son of Tengku Long, whilst the second appellant is her grandson being the son of the first appellant. Both appellants claimed that they are lawfully entitled to the land described in the said royal document, which they maintained to be a valid document of title and still subsisting. They filed a suit in the High Court asking for a declaration to that effect. The respondents denied the gift and any knowledge of it and in their application to strike out the suit they alleged *inter alia* (a) the statement of claim does not disclose any reasonable cause of action and (b) the suit is statute barred. L.C. Vohrah J. who heard the application held that there was a reasonable cause of action but the suit was caught by the Statute of Limitation. The appellants appealed.

Held, dismissing the appeal: (1) the gift of land in this case was made by the Sultan almost two years before the 1889 Land Regulations and there can be no doubt that the land law applicable to this gift was the Shariah or Islamic law;

(2) in order to constitute a valid gift under Islamic Law there must be three constituent elements namely (i) a manifestation of the wish of the donor to give; (ii) the acceptance of the donee either impliedly or expressly; and (iii) the taking of possession of the subject matter of the gift by the donee, either actually or constructively;

(3) in this case while the first two elements of a valid gift, that is, offer and acceptance, are established, there is nothing to show in the statement of claim that the donees had ever taken possession of the gift land at all either actually or constructively. Hence the gift failed because it was never perfected or consummated by the taking of possession;

(4) the subject-matter of the gift in this case was ill-defined and vaguely described without any proper delienation and only by occupation or taking possession of the

land could the extent of the donees' control be determined with precision and proper boundaries ascertained;

(5) another objection to the appellants' case is the gift land was never brought into the system of the 1889 Regulations at all;

(6) the gift land, if it was treated as a concession was never recognised by the State Government nor was it registered and if it was regarded as a native occupied land under Malay Tenure, it was also not registered as required by the 1889 Land Regulations;

(7) it is obvious therefore that the gift land was at all times State land and its ownership was never transferred to the donees despite the royal document because of the failure of the donees to take possession of the land at the time when the gift was made. That being the case, the land remained State land and continued to be so under the successive land legislation;

(8) there is no need to go into the question of limitation but even if the question is relevant there is no justification to interfere with the judgment of the learned judge.

Cases referred to:

(1) *Pahang Consolidated Co. Ltd.* v. *State of Pahang* [1931-32] F.M.S.L.R. 390; [1933] M.L.J. 247.
(2) *Mohammad Abdul Ghani & Anor.* v. *Fakhr Jahan Begam & Ors.* (1922) 49 I.A. 195, 209.
(3) *Amjad Khan* v. *Ashraf Khan* (1929) 56 I.A. 213, 219.
(4) *Jelai Concession (Pahang) Ltd.* v. *Datok Wan Tanjong (Dato Maharaja Perba Jelai), John Harold Irving* [1931-32] F.M.S.L.R. 1.

HIGH COURT (September 19, 1985).

H.L. Tennakoon (*Raja Azhar* and *Abdul Razak Ahmad* with him) for the plaintiffs.

Datuk Wan Mohamed bin Wan Muda (State Legal Adviser, Pahang) for the defendant.

L.C. Vohrah J.: This is an application on the part of the defendant for the writ of summons and statement of claim to be struck out and for the action to be dismissed with costs under Order 18 rule 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the court.

The pleaded allegations in the statement of claim setting out the facts of the plaintiffs' case are that the plaintiffs are members of the Royal Family of the State of Pahang being descendants of Almarhum Sultan Ahmad Muadzam Shah; that by a document made in the year A.H. 1305 (1888 C.E.) by Almarhum Sultan Ahmad Muadzam Shah, the then Sultan and Ruler of the State of Pahang, all that river district being the basin of the Sungei Tembeling and all its tributaries from their sources to their mouths situated in the State of Pahang ("the said land") was alienated to his daughters Tengku Long and Tengku Dalam by way of a gift *inter vivos* ("the original gift"); that the original gift was made under Muslim Law and had been duly perfected by the grantees, Tengku Long and Tengku Dalam, who became the legal and beneficial owners of the said land, that the abovementioned document constitutes an absolute grant; that the original gift subsists to this day and is not capable of being extinguished except under the provisions of Muslim Law and this has not been done, that the first plaintiff received by way of gift *inter vivos* from Tengku Long the whole of her undivided share in the said land ("the second gift"); that the second gift was a gift made under Muslim Law and had been duly perfected by the first plaintiff so that he became the legal and beneficial owner of one half of the said land; that the first plaintiff in 1976 made a gift *inter vivos* of one half of the second gift to the second plaintiff ("the third gift"); that the third gift had been perfected by the second plaintiff under Muslim Law thus making him the legal and beneficial owner of one out of four equal shares in the said land, that the plaintiffs together are accordingly the beneficial owners of one half of the said land; that the defendant has knowingly and unlawfully exercised dominion over the said land and has alienated by way of licence and/or lease various portions thereof to various persons and bodies for the purpose of logging and planting, thereby causing wrongful loss to the plaintiffs by depletion of the timber therein and by keeping to itself the income from such alienation; that the defendant has unlawfully kept out the plaintiffs from the said land in spite of several notices informing the defendant that the said land had been the subject of a royal gift in the plaintiffs' favour; that the defendant has wilfully ignored these notices and has continued to exercise unlawful dominion over the said land thus preventing them from enjoying it thereby causing loss and damage to them; and that the defendant has also wilfully and unlawfully failed and neglected to restore to the plaintiffs the portions of the said land owned by them despite several demands therefor.

In view of the foregoing averments the plaintiffs ask for a declaration that the original gift is valid and subsisting, restitution to them of all those portions of the said land which the defendant had allegedly "wrongfully alienated," and for damages and costs.

Counsel for the defendant seeks to strike out the writ of summons and the statement of claim on four grounds which can be paraphrased as follows:

1) That the plaintiffs have no reasonable cause of action against the defendant;

2) That the plaintiffs, not being the personal representatives of the estate of Tengku Long, have no *locus standi;*

3) That the plaintiffs' action is statute-barred; and

4) That 18,052 title holders in the said land have not been joined as parties to the suit.

I shall now deal with the grounds.

Having regard to the provisions of paragraph (2) of rule 19 of Order 18, I have to consider only the allegations in the plaintiffs' pleading to decide whether the plaintiffs have a reasonable cause of action or not. In view of the various averments which have been set down above *in extenso* I am satisfied that the statement of claim *per se* discloses a reasonable cause of action. I am equally satisfied that the second ground relied upon by the defendant cannot be sustained because the plaintiffs' claim is not brought in their capacities as beneficiaries of the estate of Tengku Long but in their individual capacities as persons with alleged vested interests being, as they claim, donees of the second gift and third gift respectively so that no question of any estate or personal representation of the estate of Tengku Long arises. As regards the third ground, Counsel for the plaintiffs has submitted that the law of limitation cannot apply in this case because, firstly, the defendant is not in adverse possession of the said land and, secondly, limitation does not apply to Muslim Law. I have considered this submission of Counsel very carefully but fail to see anything unusual in the very nature of this claim which excludes consideration by the Court of the prevailing provisions relating to actions which have been filed in this Court. In my view the plaintiffs' claim constitutes essentially an action to recover land because what they seek to do is to obtain the said land by the judgment of this Court so that it falls well within section 9(1) of the Limitation Act 1953 which reads:

"9.(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person."

On reading this section I take it to mean that the plaintiffs are precluded from bringing a suit of the nature inherent in this action unless it is evident that the right to enforce recovery by Tengku Long as the person through whom they claim was crystallized in legal proceedings within twelve years of the date of dispossession against her. Let us now examine the relevant facts upon which the plaintiffs found their claim as contained in the statement of claim and affidavits. It is deposed that the original gift was made to Tengku Long on the 6th day of Jamadil Awal 1305 which corresponds with January 19, 1888 as confirmed by both Counsel. The British Residency System as an undisputed matter of record came into being in the State of Pahang soon after the signing of the Treaty of Pahang on October 8, 1887 in consequence of which the following laws affecting land generally in the State of Pahang were enacted:

(i) General Land Regulations, 1889;
(ii) Land Enactment, 1897;
(iii) The Land Enactment, 1903; and
(iv) The Land Enactment, 1911.

On December 25, 1897 one Musah bin Belatok was granted a deed by the Collector of Land Revenue entitled "Agreement for a Lease" allowing him to occupy a portion of the said land and certifying that the agreement would be "replaced by a Lease in Perpetuity, subject to the State Land Regulations." This, in my view, was the first infringement of Tengku Long's right to the said land. It has not been disputed that no action was taken by Tengku Long to institute legal proceedings to challenge the alienation. It has also not been disputed by the plaintiffs that various portions of the said land have since 1897 been alienated to thousands of settlers so much so that 18,052 land titles have been issued in respect of the said land. It has also been disputed that after the demise of Sultan Ahmad in 1914 but during the life-time of Tengku Long, who died as recently as August 14, 1951, four large areas measuring 97,000 acres, 32,750 acres, 260,000 acres and 252,000 acres in the said land were declared forest reserves under both the Forest Enactment, 1914 and the Forest Enactment, 1918 during the period extending from 1918 to 1928. And again it has also not been disputed that by virtue of the Taman Negara Enactment 1939 the "State Park" consisting " of all that piece and parcel of land in the district of Lipis and in the Mukims of. Batu Yon, Kechau, Tembeling and Ulu Tembeling of an area of approximately 958 square miles ..." was declared part of the National Park dedicated "in perpetuity for the propagation protection and preservation of the indigenous fauna and flora of Malaya." The declaration of

these large areas as forest reserves and as part of Taman Negara during the life-time of Tengku Long clearly amounted to dispossession of the said land entitling any rightful owner or owners to take legal proceedings to recover what had been appropriated. It has not been disputed that no attempt was ever made by Tengku Long to enforce any legal rights to the said land for any of the acts of dispossession above-described although, in my view, the earliest act of dispossession against Tengku Long, if any, was, as I have indicated, that of Musah bin Belatok when he occupied part of the said land by virtue of the deed granted by the Collector of Land Revenue under clause 7 of the General Land Regulations on December 25, 1897 when it could be said that the right of action first accrued to Tengku Long. The wording of section 9(1) makes it very clear that the action of the plaintiffs is statute-barred and accordingly the Court cannot take cognizance of the claim.

In view of my finding in favour of the defendant on the third ground of limitation the fourth and last ground now calls for no consideration.

In the event I have to strike out the writ of summons and the statement of claim and dismiss the action with costs.

[The plaintiffs appealed to the Supreme Court.]

SUPREME COURT.

H.L. Tennakoon for the appellants.

Datuk Wan Mohamed bin Wan Muda. (State Legal Adviser, Pahang) for the defendant.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): This is an appeal from the decision of L.C. Vohrah J. striking out the writ and the statement of claim of the appellants.

The facts of the case are largely not in dispute and these are as follows:

On January 19, 1888 corresponding to 6th day of Jamadil Awal 1305 the Sultan of Pahang, Sultan Ahmad Muadzam Shah, by a document bearing the same date made a gift *inter vivos* of a large tract of land described as "all that river district being the basin of Sungei Tembeling and all the tributaries from their sources to their mouths and situate in the State of Pahang" to his daughters Tengku Long and Tengku Dalam. The first appellant is the son of Tengku Long, whilst the second appellant is her grandson, being the son of the first appellant. Both appellants claim that they are lawfully entitled to the land described in the said royal document, which they maintained to be a valid document of title and still subsisting.

They filed a suit which is the subject matter of this appeal in the High Court asking for a declaration to that effect. The respondents denied the gift and any knowledge of it and in their application to strike out the suit they gave four reasons why the court should do so; two of which are – (1) their Statement of Claim does not disclose any reasonable cause of action and (2) the suit is statute-barred. Their application was heard by L.C. Vohrah J. who held that there was a reasonable cause of action, but the suit is caught by the Statute of Limitation.

We think however that the question of the reasonableness of the appellants' cause of action which the learned judge seemed to have passed over and accepted as being established without much discussion is of primary importance and should first be examined by us before any consideration of the applicability or otherwise of the Statute of Limitation. For unless and until the appellants can show that they have a reasonable cause of action, any discussion on the applicability of the statute to their claim would be premature and irrelevant.

We therefore propose to examine the legal effect of the royal document of January 19, 1888 purporting to give the said land to Tengku Long and Tengku Dalam.

For this purpose it is necessary to look back into the state of affairs prevailing in Pahang at the time when the gift was made.

Historical perspective

It is a matter of history that Pahang was an independent State before she came under the British protection in 1889. Sultan Ahmad Muadzam Shah, otherwise known as Wan Ahmad, became the undisputed ruler of Pahang after defeating his brother Tun Mutahir following the death of their father, Bendahara Tun Ali in 1857. Sultan Ahmad Muadzam Shah was a single-minded ruler and opposed to British influence in his State. The British on the other hand were keen to have some measure of control over the government of Pahang with a view of safe-guarding their commercial interests, which they feared were in jeopardy by indiscriminate concessions, often ill-defined and

overlapping, given by the Sultan to various people. Their interests in gaining political control of the State was further heightened by rumours of Pahang's great mineral wealth. Unwilling as the Sultan was, in 1887 through the urging of Hugh Clifford and persuasion of the Sultan of Johor, who two years earlier had signed a similar treaty, Sultan Ahmad Muadzam Shah finally relented and agreed to sign an Anglo-Pahang Treaty. Under this treaty Hugh Clifford became a British Agent in Pahang with consular status. This was the beginning of the British intervention in the State. In the following year (1888) the murder of a Chinese name Jo Hui (Go Cui) who was allegedly a British subject provided a first class opportunity for Clementi Smith, the Governor of the Straits-Settlements, to seize upon the incident to extract a sort of recapitulation letter from the Sultan. In this letter dated August 24, 1888 the Sultan acknowledging responsibility for the murder, requested the British Government to send a British officer to assist him "in matters relating to the Government of Pahang on similar system to that existing in other Malay States under British protection" and in return the Sultan asked for British guarantee to him and his successors of all their privileges and powers and also an undertaking not to interfere with Malay custom and Islamic religion. In 1889 Sultan Ahmad Muadzam Shah abdicated the throne in favour of his son Tunku Mahmud (See 'A Collection of Treaties affecting the States of Malaysia 1761-1963,' Vol. 1, pages 347-355).

There can be no doubt that before the British intervention, the Sultan was an absolute ruler of his State in whom powers to make laws and to govern the State were vested, and that he exercised these powers presumably after advice of or more appropriately, consultation with his Orang-Orang Besar (ministers), was sought or held. After the British intervention, however, he still remained an absolute ruler but was required to administer the State with the advice of a British Resident. But in practice as shown in the judgment of the Privy Council Appeal No. 27 of 1932 in *The Pahang Consolidated Company Limited* v. *The State of Pahang*,[1] it was the British Resident who exercised the powers on behalf of the Sultan. In this case, a mining lease in respect of a large tin mine in Pahang which was the subject matter of the suit was granted on December 8, 1898 by the British Resident on behalf of the Sultan.

One of the primary reasons of the British intervention in Pahang was their concern at the indiscriminate concessions of agricultural lands given out by the Sultan to all and sundry in order to boost-up the State's revenue. The British were fearful that unless the grant of concessions was exercisable on a rational basis there would be chaos and disputes would arise which would finally affect their commercial interests adversely. Hence once they obtained control over the government they lost no time in introducing their system of administration. A number of regulations were soon made and the most important one is the Government Land Regulations dated December 31, 1889.

The Regulations were the beginning of the present system of land administration in Pahang. Until then the land law applicable was Shariah Law of the Shafie school. Eight years later the Regulations were repealed and replaced by the Land Enactment 1897, and the Registration of Title Enactment 1897 which came into force on November 29, 1887 and December 24, 1897 respectively. The 1897 Land Enactment was subsequently replaced by the Land Enactment 1903 which came into force on July 1, 1903, and this Enactment was later superseded by FMS Land Code 1926 on December 24, 1926 and finally by the present National Land Code in 1965.

Muslim law

The gift of land in this appeal made by the Sultan almost two years before the 1889 Land Regulations and there can be no doubt that the land law applicable to this gift was Shariah Law. By this law a Muslim acquires ownership of any piece of land which has never been cultivated in a Muslim country by clearing and working upon it. A non-Muslim however cannot acquire title to the land by this method. He has either to get it from the sovereign or from a Muslim owner by way of gift or sale (*Minhaj-et-Talibin* p. 226). As regards gift of land, whether it be to a Muslim or to a non-Muslim the gift will not be valid unless the donee takes possession of the gift land at the time the gift is made. In other words, a gift will transfer the ownership of the subject matter of the gift to the donee only upon the latter taking possession of it (*Minhaj-et-Talibin* p. 234). In *Mohammad Abdul Ghani & Anor.* v. *Fakhr Jahan Begam & Ors.*[2] and *Amjad Khan* v. *Ashraf Khan*[3], which dealt with the validity of gift under Muslim law the Privy Council applied the same principle. In these two cases their Lordships accepted the view of Syed Ameer Ali (the learned author of Mohammadan Law, 4th ed. Vol. I, p. 41) to the effect

that to constitute a valid gift there must be three constituent elements, namely (1) a manifestation of the wish of the donor to give; (2) the acceptance of the donee either implied or expressly; and (3) the taking possession of the subject matter of the gift by the donee, either actually or constructively.

Turning now to the royal document which is relied upon by the appellants, we have no hesitation to say that the first two elements of a valid gift, *i.e.* offer and acceptance are established. But as to the third element there is nothing to show in the statement of claim that the donees had ever taken possession of the gift land at all either actually or constructively. Hence the gift failed. It failed because it was never perfected or consummated by the taking of possession.

Description of the land

It is a matter of general commonsense that any law must always aim at achieving certainty, otherwise it will fail to play its role in regulating social conditions. The requirement of taking possession by the donee as a condition for the transfer of ownership is aimed at ensuring certainty of the subject matter of the gift and for the purpose of conferring public recognition that the donee has become the owner of the gift property. This is all the more necessary when the subject matter of the gift is so ill-defined and so vaguely described without proper delienation as the land in this case. To describe the gift land as "all that river district being the basin of Sungei Tembeling and all the tributaries from their source to their mouths and situate in the State of Pahang" is so vague as to mean nothing. While it could be somewhere, it could also mean everywhere and nowhere. How far inland are the boundaries of the gift land from each side of the banks of Sungei Tembeling and its tributaries? What was the extent of the river district? What was the size of the land? No answers to these inquiries, in our view, can be given by the descriptions of the land stated in the royal gift. Only by occupation or taking possession of the land could the extent of the donees' control be determined with precision and proper boundaries ascertained.

Pahang Land Regulation 1889

Another objection to the appellants' case is that the gift land was never brought into the system of the 1889 Land Regulations at all. It is unthinkable that this land should be left out of the system since the Regulations were intended to be so comprehensive as to cover all the lands in the State of Pahang. For this reason the Regulations enacted that all lands in the State were divided into the following four classes:

Class I – land available for agricultural purposes;

Class II – land in occupation of natives under Malay tenure;

Class III – building allotments in towns and villages or government reserves; and

Class IV – mining reserves.

The main aim of the Regulations was to introduce a system of compulsory registration of lands in the State with a view to exercising some control over the Sultan's power of issuing concessions indiscriminately. We are not concerned here with the 3rd and 4th classes of lands since the gift land is neither a building allotment nor a mining reserve. Thus, we will only deal with the first two classes of lands.

Under the Regulations all holders of concessions of Class I lands (lands available for agricultural purposes) granted by the Sultan had first to be recognized by the State Government and only the recognized concessions were required to be registered in the District Land Office. Failure to register them, despite recognition by the Government, rendered these concessions void. As regards Class II lands *i.e.* lands occupied by natives under Malay tenure, such lands were required by the Regulations to be registered in the "Register Native Holdings" kept by the District Collector within three months of the date of the Regulations. Failure to register them rendered the rights of the occupiers in respect of such lands liable to forfeiture.

We were referred to a document dated January 4, 1901 purporting to be a diary kept by the late Sultan Ahmad Muadzam Shah concerning the gift land. According to this diary the late Sultan wrote a letter on October 12, 1900 to the then British Resident Hugh Clifford in which he maintained that although he (the late Sultan) agreed to the request by the British Resident to cancel all concessions, he however did not consent to the cancellation of his gifts to his children and to other absolute grants.

The admissibility of this diary was objected to by the respondent, presumably on the ground of lack of authenticity and of the hearsay contents of the letter written by the late Sultan on

October 12, 1900 which the diary purported to have stated.

In our view, without considering the admissibility of the diary, *i.e.* even if it is admitted as evidence, we cannot see how it would assist the appellants to prove their title to the gift land. The diary seems to indicate that the Pahang State Government did not recognize the title of the gift land and that is why the late Sultan – by then he was no longer the Sultan because of his abdication in favour of his son – pleaded with the British Resident to accord recognition thereto so that it could be registered under the General Land Regulations 1889. This diary is therefore not of assistance to the appellants' case.

Counsel for the appellants also referred us to *The Jelai Concession (Pahang) Limited* v. *Datoh Wan Tanjong (Dato Maharaja Perba Jelai), John Harold Irving.*[4] According to this case, the issue therein was different from the issue which we are called upon to decide in the present appeal. In the *Jelai Concession* case the late Sultan of Pahang on August 20, 1887 gave a large tract of land situated on the river Jelai Kechil in the district of Kuala Lipis to Dato Maharaja Perba Jelai. On July 26, 1923 his son also assuming the same title, gave a mining lease over this land to two Chinese for a term of 50 years. The two Chinese in turn assigned this lease to the Jelai Concession Syndicate on June 30, 1924 which eventually assigned the lease to the Jelai Concession (Pahang) Limited. The late Dato's son refused to recognize the assignment on the ground that the lease he had given to the two Chinese on July 26, 1923 was invalid because it was not registered under section 5 of the Registration of the Titles Enactment 1911. According to this section any transfer of land whether by mortgage, charge or otherwise must be registered, otherwise it would not be effective. Chief Justice Elphinstone held section 5 did not apply to the land held for mining purposes and thus the lease granted by the son of the late Dato to the two Chinese on July 26, 1923 was valid. It must be noted that the question of the validity of the gift of land by the late Sultan to the late Dato was not in issue at all. The title of the lessor (the son of the late Dato) who gave the lease in favour of the two Chinese was not questioned. We would therefore assume that the land in question must have been recognized and registered under the General Land Regulations.

The position in the present appeal is entirely different because the issue here relates to the validity of the gift and the title of the donees under the gift. We therefore hold that the *Jelai Concession* case has no application to the present case under appeal.

As regards new concessions and new occupations of native lands, these would have to be applied for and given out in accordance with the procedure laid down by the Regulations.

Another principle introduced by the Regulations was that the land must have proper boundaries and proper shape. The land must therefore be surveyed and boundaries fixed.

Conclusion

In the case before us the gift land, if it were treated as a concession, was never recognized by the State government nor was it registered; and if it were regarded as a native occupied land under Malay tenure, it was also not registered as required by the Regulations. It is obvious therefore that the gift land was at all times State land and its ownership was never transferred to the donees despite the royal document because of the failure of the donees to take possession of the land at the time when the gift was made.

That being the case, this land therefore remained State land and continued to be so under successive land legislation. Section 2 of the 1897 Land Enactment which replaced the 1889 Land Regulations defined "State land" as follows:

> " 'State land' means all lands which have not been and may not hereafter be reserved for any public purposes, or which have not been leased or granted to or are not lawfully occupied by any person, and includes all lands which, at the commencement of this Enactment, may have become or which hereafter may become forfeited by reason of any breach in the conditions on which the same have been lawfully occupied."

The same definition of State land was repeated by the 1903 Land Enactment.

In view of the definition it is not possible to hold the gift land to be otherwise than State land. Thus it is clear that the gift land remained at all times State land.

On the question of limitation, in view of our decision there is no need for us to go into it. Further, even if the question is relevant we could find no justification to interfere with the judgment of the learned judge.

Thus for the reasons stated above the appeal is therefore dismissed. In this case we feel that it is only fair that each party should bear its own costs. Therefore the appeal deposit should be refunded to the appellants.

Appeal dismissed.

Solicitors: *H.L. Tennakoon.*

DUNLOP INDUSTRIES EMPLOYEES UNION v. DUNLOP MALAYSIAN INDUSTRIES BHD. & ANOR.

[S.C. (Abdul Hamid C.J. (Malaya), Seah & Abdoolcader S.C.JJ.) January 21 & 24, 1987]

[Kuala Lumpur — Supreme Court Civil Appeal No. 481 of 1986]

Industrial Law — Powers of Industrial Court in hearing complaint of non-compliance with collective agreement — Failure to give reasonable advance notice of retrenchment of employees — Whether Industrial Court can order reinstatement — Application for certiorari to quash decision — Industrial Relations Act, 1967, ss. 17, 30A & 56.

Administrative Law — Application for certiorari to quash decision of Industrial Court — Powers of Industrial Court in hearing complaint of non-compliance with collective agreement — Failure to give reasonable notice of retrenchment of employees — Whether Industrial Court can order reinstatement — Industrial Relations Act, 1967, ss. 17, 30A & 56.

In this case the respondent employers and the appellant trade union had entered into a collective agreement which provided *inter alia* that the respondent will give such advance notice as it is reasonably possible to the appellant in writing of any redundancy or retrenchment but such notice shall not be less than two months prior to retrenchment. The respondent informed the appellant of the need to retrench some of its employees and issued the notices of retrenchment on the same day. The appellant protested and subsequently lodged a complaint with the Industrial Court of non-compliance of the collective agreement. The Industrial Court held that the appellant had made out its case and ordered the employees to be reinstated. The respondent then applied to the High Court for certiorari to quash the decision of the Industrial Court. The High Court holding that the Industrial Court had acted in excess of jurisdiction in ordering reinstatement when dealing with a complaint of non-compliance, quashed the award of the Industrial Court. The appellants appealed.

Held: it is abundantly clear that the Industrial Court could in the circumstances of the complaint of non-compliance in this case make the order that it did for the retrenched employees to be reinstated and this order was properly made in accordance with the provisions of section 56(2)(b) of the Industrial Relations Act, 1967, for the purpose of making proper rectification and restitution for a contravention of a term of the collective agreement. The order of the learned Judge of the High Court in quashing the award of the Industrial Court must therefore be set aside.

Case referred to:

(1) *Foo Loke Ying & Anor.* v. *Television Broadcasts Ltd. & Ors.* [1985] 2 M.L.J. 35, 43.

SUPREME COURT.

B. Lobo for the appellant.

C.V. Das (*R. Rajasingam* with him) for the respondent.

Cur. Adv. Vult.

Abdoolcader S.C.J. (delivering the Judgment of the Court): The crux of the case in the matter before us which is *res integra* concerns the semantic content and ambit of the functional application by the Industrial Court of the provisions of section 56, and more particularly subsection (2)(b) thereof, of the Industrial Relations Act, 1967 ('the Act') in considering a complaint of non-compliance with a provision for advance notice to a trade union under a collective agreement taken cognizance of by it prior to a retrenchment exercise implemented instanter in breach thereof and a *fait accompli* at the time of the complaint. This will involve and require a plain consideration of the terms of section 56 and other germane provisions of the Act, and to avoid tautology, all references to statutory provisions in this judgment relate to the Act. We would add that the Industrial Court was not a necessary party to have been joined as a second respondent to the application for certiorari and even less so as the second respondent in this appeal, and for the purposes of this judgment we will refer to Dunlop Malaysian Industries Berhad as the respondent.

The appellant and the respondent entered into a collective agreement in 1982 which was taken cognizance of by the Industrial Court in Cognizance No. 67 of 1983. The collective agreement is accordingly by virtue of section 17(1) binding on the parties and their integrants, and in accordance with the provisions of subsection (2) of section 17 it is an implied term of the contract between the respondent and its employees that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by